Pengarah Jabatan Perhutanan Negeri Selangor Darul Ehsan & Anor v Sykt Sebati Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-72–03 OF 2016
HAMID SULTAN, ZAMANI A RAHIM AND ZALEHA YUSOF JJCA
7 DECEMBER 2016

Contract — Terms — Certainty — Appellant approved respondent's application for logging concession subject to condition concession could be withdrawn at any time without reason — Subsequent draft formal agreement between parties allowed appellant to terminate on certain grounds with payment of compensation to respondent — Whether High Court's reading of termination clauses in both documents as part of one contract offended rule on 'certainty of terms' — Whether respondent's failure to prove which of the two agreements prevailed between parties in their day-to-day affairs fatal to its case — Whether government/government bodies could only be bound if contract formally executed according to Government Contracts Act 1949 ('the GCA') — Whether the GCA did not permit government/government bodies to be contractually liable by way of conduct, acquiescence or implied agreement

By way of a letter ('the approval letter'), the first appellant ('A1') informed the respondent that the second appellant ('A2') had approved its application for a logging concession. The approval was subject to, inter alia, (a) a formal agreement between the respondent and A2 being signed within six months, and (b) the condition that A2 could at any time it deemed necessary wholly or partly withdraw the land under the logging concession ('the approval letter termination clause'). Pursuant to the approval letter the respondent was allowed to begin logging activities. The respondent subsequently sent two draft agreements for A2's execution but there was no response. Later, A1 sent a draft agreement ('the draft formal agreement') to the respondent. The respondent made some revisions thereto and sent the agreement back for consideration but again there was no response. Subsequently, A1 wrote to the respondent requesting it to apply for an alternative logging area. The respondent treated this as a termination and sued the appellants in the High Court ('the first action'). The court dismissed the respondent's claim holding that: (i) although there was a valid and binding logging contract between the parties, the terms of which were contained in both the approval letter and the draft formal agreement, the appellants did not repudiate the contract and therefore the respondent could not claim for any damages; (ii) the appellants, by conduct, had acquiesced to the terms of the draft formal agreement and were therefore bound by it; and (iii) the contract between the parties had two termination clauses — one was the approval letter termination clause; the other was

contained in cl M of the draft formal agreement which allowed A2 to terminate (without having to give any reason) if it considered the termination necessary in the interest of the nation or national security or for government or public policy reasons and that upon such termination the respondent was entitled to compensation as determined by an independent auditor appointed by the government. In the instant originating summons ('OS'), the respondent, relying upon the findings of the court in the first action, argued that it was entitled to compensation under cl M. The High Court agreed, allowed the OS and directed that an independent valuer assess the compensation payable. In the instant appeal against that decision, the appellants argued that there was only one agreement and that was the approval letter and that the draft formal agreement was not valid and enforceable under the GCA. They contended that the High Court erred in ruling that both the approval letter and the draft formal agreement could be treated as one contract even though the termination clauses in both documents vastly differed from one another.

Held, allowing the appeal and setting aside the order of the High Court:

(1) To say that the approval letter as well as the draft formal agreement had become one contract was not sustainable in law. It was either the terms of the approval letter or the terms of the draft agreement. Any construction otherwise would breach the rule as the requirement of 'certainty of terms' (see para 16(b)).

(2) The only document where both parties agreed to be binding was the approval letter. The respondent asserted that the termination must be pursuant to cl M of the draft agreement. The appellants asserted that the termination ought to be based on the approval letter. No evidence was led by the respondent in the OS for this court to ascertain based on which agreement the parties proceeded in the conduct of their business. The respondent's failure to lead evidence on which agreement the parties conducted their day-to-day affairs was fatal to its case (see para 16(a)).

(3) This court was not prepared to condone the proposition in the first action, which was followed by the High Court judge in the instant case, that the appellants 'had acquiesced to those terms' when the requirements of ss 2 and 3 of the GCA had not been met. The draft formal agreement, in law, could not be construed as a contract without execution as well as evidence that it had been executed as per the requirements of the GCA. Any breach would be a nullity ab initio whether or not the parties had raised it in their pleadings, arguments and/or the memorandum of appeal. Government and/or government bodies might not be liable on the basis of 'conduct' and/or implied contract and/or acquiescence, etc; to conclude that there was in fact a

contract based on a draft agreement which had not been duly executed. There might be exceptions if the claim was based on quantum meruit, etc (see paras 6, 11 & 16(c)).

(4) The principles of res judicata on the facts were not applicable. The respondent's reliance on that doctrine was misconceived, taking into consideration the provisions of the GCA (see para 12).

[Bahasa Malaysia summary

Melalui surat ('surat kelulusan'), perayu pertama ('A1') memaklumkan responden bahawa perayu kedua ('A2') telah meluluskan permohonannya untuk konsesi pembalakan. Kelulusan tersebut tertakluk pada, antara lain, (a) perjanjian bertulis antara responden dan A2 ditandatangani dalam masa enam bulan, dan (b) syarat bahawa A2 boleh, pada bila-bila masa dirasakan perlu, secara penuh atau separa menarik balik tanah bawah konsesi pembalakan ('klausa penamatan surat kelulusan'). Susulan surat kelulusan, responden dibenarkan memulakan akitivi-aktiviti pembalakan. Responden seterusnya menghantar dua deraf perjanjian bagi meterai oleh A2 tetapi tidak mendapat jawapan. Kemudian, A1 menghantar deraf perjanjian ('deraf perjanjian rasmi') kepada responden. Responden membuat semakan dan menghantar semula perjanjian tersebut bagi pertimbangan tetapi tidak mendapat respon. Seterusnya, A1 meminta respondent untuk memohon kawasan pembalakan alternatif. Responden menganggap ini sebagai penamatan dan menyaman perayu-perayu di Mahkamah Tinggi ('tindakan pertama'). Mahkamah menolak tuntutan responden, memutuskan bahawa: (i) walaupun terhdapat kontrak pembalakan yang sah dan mengikat antara pihak-pihak, terma yang terkandung dalam kedua-dua surat kelulusan dan deraf perjanjian formal, perayu-perayu tidak boleh menolak kontrak dan dengan itu, responden tidak boleh menuntut apa-apa kerosakan; (ii) perayu-perayu, melalui tindakan, telah melepaskan terma-terma deraf perjanjian rasmi dan dengan itu terikat padanya; dan (iii) kontrak antara pihak-pihak mempunyai dua klausa penamatan — satu adalah klausa penamatan surat kelulusan; satu lagi terkandung dalam klausa M deraf perjanjian formal yang membenarkan A2 menamatkan (tanpa memberi apa-apa alasan) jika ia merasakan penamatan adalah perlu bagi kepentingan negeri atau keselamatan negeri atau bagi kerajaan atau alasan-alasan polisi awam dan bahawa dengan penamatan sedemikian, responden berhak mendapat pampasan seperti yang ditentukan oleh auditor bebas yang dilantik oleh kerajaan. Dalam saman pemula ini ('SP'), responden, bersandar pada dapatan-dapatan mahkamah dalam tindakan pertama, menghujahkan bahawa ia berhak mendapat pampasan bawah klausa M. Mahkamah bersetuju, membenarkan OS dan mengarahkan seorang penilai bebas mentaksir pampasan yang perlu dibayar. Dalam rayuan ini terhadap keputusan, perayu-perayu menghujahkan bahawa hanya terdapat satu perjanjian sahaja iaitu surat kelulusan dan bahawa deraf perjanjian formal tidak sah dan tidak

berkuat kuasa bawah Akta Kontrak Kerajaan 1949 ('Akta'). Mereka menghujahkan bahawa Mahkamah Tinggi khilaf apabila memutuskan kedua-dua surat kelulusan dan deraf perjanjian formal boleh dianggap sebagai satu kontrak walaupun klausa-klausa penamatan dalam kedua-dua dokumen sangat berbeza dengan satu sama lain.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi:

(1) Untuk mengatakan surat kelulusan serta deraf perjanjian formal menjadi satu kontrak adalah tidak mapan bawah undang-undang. Ia adalah sama ada terma-terma surat kelulusan atau terma-terma deraf perjanjian. Pembentukan sebaliknya akan melanggar peraturan dan syarat kepastian terma-terma (lihat perenggan 16(b)).

(2) Satu-satunya dokumen di mana kedua-dua pihak bersetuju mengikat adalah surat kelulusan. Responden menghujahkan bahawa penamatan mestilah bawah klausa M deraf perjanjian. Perayu-perayu menghujahkan bahawa penamatan seharusnya berdasarkan surat kelulusan. Tiada keterangan yang dikemukakan oleh responden dalam SP bahawa mahkamah ini perlu mengenal pasti berdasarkan perjanjian mana yang menjadi sandaran pihak-pihak untuk meneruskan dengan urusan mereka. Kegagalan responden untuk mengemukakan keterangan tentang perjanjian mana yang mereka sandarkan untuk meneruskan urusan mereka menjejaskan kes mereka (lihat perenggan 16(a)).

(3) Mahkamah ini tidak bersedia untuk menyetujui cadangan dalam tindakan pertama, yang diikuti oleh hakim Mahkamah Tinggi dalam kes ini bahawa perayu-perayu telah menyetujui terma-terma tersebut sedangkan syarat-syarat ss 2 dan 3 Akta belum dipenuhi. Deraf perjanjian formal, bawah undang-undang, tidak boleh ditafsir sebagai kontrak tanpa pelaksaan dan keterangan bahawa ia dilaksanakan berdasarkan syarat-syarat Akta. Apa-apa pelanggaran adalah terbatal *ab initio* sama ada atau tidak pihak-pihak membangkitkannya dalam pliding, hujahan dan/atau memorandum rayuan mereka. Kerajaan dan/atau badan kerajaan mungkin tidak bertanggungan atas dasar 'tindakan' dan/atau kontrak yang disiratkan dan/atau persetujuan, dan sebagainya; untuk menyimpulkan bahawa sebenarnya terdapat kontrak berdasarkan deraf perjanjian yang belum dilaksanakan. Mungkin terdapat pengecualian jika tuntutan tersebut berdasarkan kuantum meruit dan sebagainya (lihat perenggan 6, 11 & 16(c)).

(4) Berdasarkan fakta-fakta, prinsip *res judicata* tidak terpakai. Pergantungan responden pada doktrin tersalah arah, mengambil kira peruntukan Akta (lihat perenggan 12).]

Notes

For a case on certainty, see 3(4) *Mallal's Digest* (5th Ed, 2015) para 7125.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)
China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1; [2014] 7 CLJ 644;; [2014] 5 MLRA 289, CA (refd)
Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1, FC (refd)
Hj Khalid Abdullah, Re v Ex P Danaharta Urus Sdn Bhd [2007] MLJU 456; [2008] 2 CLJ 326, HC (refd)
Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108, SC (refd)
KP Chowdhary v State of Madhya Pradesh AIR 1967 SC 203; 1966 3 SCR 919, SC (refd)
Seth Bikhraj Jaipuria v Union of India AIR 1962 SC 113, SC (refd)
Sundralingam v Ramanathan Chettiar [1967] 2 MLJ 211, FC (refd)
Suwiri Sdn Bhd v Government of the State of Sabah [2008] 1 MLJ 743; [2008] 1 CLJ 123, FC (refd)
Syarikat Sebati Sdn Bhd v Pengarah Jabatan Hutan Negeri Selangor & Anor [2014] MLJU 645; [2014] 1 LNS 537, HC (refd)
Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, intervener) [1992] 2 MLJ 434, HC (refd)

Legislation referred to

Constitution of India [IND] art 299, 299(1)
Evidence Act 1950
Government Contracts Act 1949 ss 2, 3

Appeal from: Originating Summons No 24–733–06 of 2015 (High Court, Shah Alam)

Norazimin bt Kassim (State Legal Advisor, Selangor State Legal Advisor Office) for the appellants.
K Kirubakaran (R Ramanathan, Nadzarin Wok Nordin and Wong Jing En with him) (Nadzarin Kuok Puthucheary & Tan) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellants/defendants appeal against the decision of the learned High Court judge who had ruled that the appellant is bound by draft

agreement which has not been duly executed by the government and/or government bodies as binding on the appellant.

[2] In the instant case, the learned trial judge had relied on a previous judgment ('the first judgment') of the High Court which was not able to give any relief to the respondent/plaintiff on the ground that the respondent's action was premature.

[3] What is important to note in this case is that the plaintiff in this action has proceeded based on the originating summons notwithstanding that the plaintiff's argument was that the defendants by conduct were bound by the draft agreement. The plaintiff here relies on the previous suit where the High Court had found that the letter of offer ('approval letter') by which the plaintiff commenced logging activities and the subsequent draft agreement were binding on the defendant. However, the High Court said as the agreement was not terminated by the defendant, the plaintiff could not seek for damages.

[4] On appeal to the Court of Appeal by the defendants, we are told that the appeal was dismissed and there was no grounds on what basis the appeal was dismissed. In consequence, we have to largely rely on the first judgment of the High Court, though we are not obliged to agree to the reasoning of the said court, more so when the learned High Court judge in the first case had in essence, ruled that the government and/or government bodies can by conduct be liable on the draft agreement. Support for the proposition is found in a number of cases. For example:

(a) in *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211 it was stated that each court is bound by the decisions of the courts above it, but individual judges are not bound by each other decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinion of their brethren. Further, the court stated that within the past decade and even the last lustrum, judges in Malaya have on several occasions respectfully agreed to differ, as may be seen from the reports in the Malayan Law Journal;

(b) in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, the Federal Court stated that, 'the Federal Court and its forerunner, ie the Supreme Court has never refused to depart from its own decision when it appeared right to do so. The effect or weight of a decision of a 'full court' and that of an ordinary coram is the same. When two decisions of the Federal Court conflict on a point of law, the later decision prevails over the earlier decision'; and

(c) in *Re Hj Khalid Abdullah v Ex P Danaharta Urus Sdn Bhd* [2007] MLJU 456; [2008] 2 CLJ 326, the court had this to say:

> Stare decisis is nothing more than judge made law, which requires the decision of the apex court to be followed to ensure that there is certainty in the application of law to achieve substantive justice. This principle of stare decisis cannot tie the hands of individual judges of His Majesty in administering substantive justice when the decision of the apex court will perpetuate fraud or reward fraud or the decision per se can be said to be abhorrent to notions of justice and fair play or inconsistent with subsequent amendments to Act of Parliament or rules of procedure, etc (see *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133, *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1; [2000] 3 CLJ 769, and *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65; [2000] 4 CLJ 1; Article [2001] MLJ 1: xlix). This is so because each and every judge has taken an oath of office individually and not collectively to protect the Constitution. When an apex court decision is fatally flawed and will cause substantive injustice, then the stare decisis principle cannot override the constitutional responsibility of a judge, for if he does so, it will be in breach of his oath of his office. When the English Courts were dealing with the sanctity of the principles of stare decisis, they were not focused on issues relating to appellate courts' decisions which promote fraud or rewards fraud or the enforcement of the decision of the appellate court will cause substantive miscarriage of justice, the nature of which any courts ought not to condone or entertain. Thus, to apply the principles of stare decisis to such cases will, in my view, be in breach of sacrosanct oath of the office of the judge. Further, perpetration of illegality is no part of the doctrine of stare decisis. Support for my proposition can be found in various cases and writings. Some of them are as follows ...

[5] It must be emphasised that, every judgment must be read as applicable to the particular facts pleaded and proved. The generality of expressions which may be found in the judgment are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. Expression of judges must be understood in relation to the subject matter before the court as well as related legal inclusive of procedural principles (see *Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, intervener)* [1992] 2 MLJ 434; *Janab's Key To Civil Procedure* (5th Ed) at pp 20–21).

JURISPRUDENCE RELATING TO GOVERNMENT CONTRACT

[6] The jurisprudence relating to execution of government contracts is anchored pursuant to the Government Contracts Act 1949 (Revised 1973) Act 120 ('the GCA 1949'). Essentially, it displaces the common law position as well as principles relating to contract. Some principles related to this case is that in our view, the government and/or government bodies may not be liable on the basis of 'conduct' and/or implied contract and/or acquiescence, etc; to conclude that there was in fact a contract based on a draft agreement which has not been duly executed. There may be exceptions if the claim is based on

quantum meruit, etc. The parties' submission here was not comprehensive notwithstanding that the appellant main contention is that there is only one agreement and that is the 'approval letter' and the draft agreement is not valid and enforceable. The said GCA 1949, ss 2 and 3 read as follows:

> 2 Contracts on behalf of the Government
>
> All contracts made in Malaysia on behalf of the Government shall, if reduced to writing, be made in the name of the Government of Malaysia and may be signed by a Minister or by any public officer duly authorized in writing by a Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.
>
> 3 Contracts on behalf of a State Government
>
> (1) All contracts made in Malaysia on behalf of a State Government shall, if reduced to writing, be made in the name of the Government of that State, and may be signed by the Chief Minister of the State, or by any public officer duly authorized in writing by the Chief Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.
>
> (2) In the application of this section to Sabah and Sarawak 'Chief Minister' includes any State Minister.

[7] The Indian position is covered by art 299 of the Constitution of India. It must be noted that there is no similar provision in our Constitution. However, the Government Contracts Act was already in place before independence. The said art 299 of the Indian Constitution reads as follows:

> 299 Contracts (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

[8] In *Seth Bikhraj Jaipuria v Union of India* AIR 1962 SC 113, the Indian Supreme Court in dealing with art 299(1) had this to say:

> it is clear from the words 'expressed to be made' and 'executed' that there must be a formal written contract ... The provisions of Article 299(1) are mandatory in character and any contravention thereof nullifies the contract and makes it void. The provisions of Article 299(1) have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against the unauthorised contracts. The provisions are embodied in the constitution on the ground of public policy on the ground of protection of general public and these formalities cannot be waived or dispensed with.

In *KP Chowdhary v State of Madhya Pradesh* AIR 1967 SC 203; 1966 3 SCR 919 that:

> In view of the provisions of Article 299(1) there is no scope for any implied contract.

> Thus no contract can be implied under this Article. if the contract between the Government and a person is not incompliance with Article 299(1), it would be no contract at all and would not be enforceable as a contract either by the Government or by the person.

[9] The law on art 299(1) has been summarised on the subject by the learned author HK Saharay in his book *The Constitution of India* (2nd Ed) at p 635 as follows:

> The law on the subject which emerges from various authorities is as follows: (a) A formal deed or document of contract is not necessary; (b) A contract can be inferred from correspondence; (c) A mere tender and acceptance is sufficient to constitute a valid contract; (d) The contract must be entered into by an authorised person. However, a contract entered into by an unauthorised person can be ratified by the Government particularly if it is for the benefit of the Government; (e) No particular mode in which authority is conferred has been prescribed by Art. 299(1). Normally such conferment is by a notification in the Official Gazette. But it can also be *ad hoc* on any person; (f) The sanction to the contract can be expressly or impliedly given and while inferring the sanction, the actions apart from the execution of the document can be considered; (g) A contract entered into without complying with the requirements of Art 299(1) is void in the sense that it cannot be enforced by either party to the contract.

[10] In the instant case, the appellant in the submission had referred to the GCA 1949. The respondent did not substantively reply to that part of the submission. Further, we also note that the learned judicial commissioner in the first judgment had not referred to the effect of the GCA 1949 in his judgment.

[11] In our view, the draft agreement in law cannot be construed as a contract without execution as well as evidence that it has been executed as per the requirement of the GCA 1949 (see *Suwiri Sdn Bhd v Government of the State of Sabah* [2008] 1 MLJ 743; [2008] 1 CLJ 123). Any breach will be a nullity *ab initio* whether or not the parties have not raised it in the pleadings, arguments and/or memorandum of appeal (see *Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1; [2014] 7 CLJ 644; [2014] 5 MLRA 289).

[12] Further, we take the view that the principles of res judicata on the facts are not applicable. The plaintiff's reliance on the principles of re judicata here is misconceived, taking into consideration the provisions of the GCA 1949. Support for the proposition is found in a number of cases. For example, in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 (CA), Gopal Sri Ram JCA (as he then was) had this to say:

> Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is

designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.

In *Carl-Zeiss Stiftung v Rayner and Keeler Ltd & Ors (No 2)* [1966] 2 All ER 532 at p 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case ([1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21). *All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.* (Emphasis added.)

In *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 at p 109, Lord Keith of Kinkel expressed the following view:

> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. *One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result*, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss*case [1966] 2 All ER 536 at p 573, [1967] 1 AC 853 at p 947. (Emphasis added.)

In a later passage, I find Lord Keith saying:

> Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the respondents permission to reopen the disputed issue.

These views were very recently reaffirmed by the House of Lords in *Johnson v Gore Wood & Co* (2000) (Unreported, speeches published on 14 December 2000). See in particular the speech of Lord Bingham of Cornhill, at pp 8–10 of the transcript.

On the authorities discussed thus far, the principle comes to this. Whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies.

Adopting the approach that commends itself to me, I find that the justice of the present instance demands that the decision in *Scotch Leasing (No 1)* ought not, in the interests of justice, to bar the appellants from reagitating the issue of the jurisdiction of the High Court to make the order for sale in the initial foreclosure proceedings. There are three reasons that move me in this direction.

BRIEF FACTS

[13] The facts of this case had been well articulated in the first judgment (see *Syarikat Sebati Sdn Bhd v Pengarah Jabatan Hutan Negeri Selangor & Anor* [2014] MLJU 645; [2014] 1 LNS 537). We do not wish to set out the full facts, save as to the followings:

(a) by the 'Approval Letter', the first defendant informed that the plaintiff had been given a logging concession. The said letter reads as follows:

Ruj. Kami: PHN.Sel.05/10/1/39 (1)
Tarikh: 30hb September, 1999

Pengurus

Syarikat Sebati Sdn. Bhd.,

Lot 3005, Jalan Ulu Yam Baru

44300 Batang Kali

Hulu Selangor.

Tuan,

Permohonan Peruntukan Kawasan Hutan Untuk

Perjanjian Jangka Panjang Oleh Sebati Sdn. Bhd.

Bagi Pengurusan Hutan Secara Berkekalan.

Dengan hormatnya merujuk kepada perkara di atas sukacita dimaklumkan bahwa Majlis Mesyuarat Kerajaan Negeri Selangor yang bersidang pada 18 Ogos, 1999 telah meluluskan permohonan tuan bagi kawasan hutan perjanjian jangka panjang sejumlah lebih kurang 9,000 hektar di Hutan-hutan Simpanan Gading dan Bukit Belata seperti di pelan dan lampiran-lampiran berkembar dengan syarat-syarat berikut:-

a) Satu Perjanjian hendaklah ditandatangani di antara Kerajaan Negeri dan pihak Syarikat Sebati Sdn. Bhd. dalam masa 6 bulan kelulusan diberikan;

b) Tempoh perjanjian adalah selaraa 30 tahun mulai 1999 sehingga 2028.

c) Catuan Tebangan Tahunan ialah seluas lebih kurang 300 hektar setahun.

d) Pihak Syarikat hendaklah menyediakan satu Rancangan Pengurusan Hutan untuk setiap sepuluh tahun dan juga bagi tempoh perjanjian bagi kawasan tersebut.

e) Satu Rancangan Pengusahasilan Hutan perlu disedia dan diluluskan oleh Pengarah Perhutanan Negeri sebelum sesuatu kawasan catuan dibuka.

f) Syarikat juga hendaklah melaksanakan kerja-kerja pemulihan dan

pembangunan hutan di kawasan tersebut dan satu rancangan pembangunan hendaklah disediakan. Satu laporan kemajuan tahunan mengenai aktiviti-aktiviti yang dijalankan hendaklah dikemukakan kepada Pengarah Perhutanan Negeri untuk tujuan pemantauan.

g) Semua operasi perhutanan syarikat hendaklah sentiasa tertakluk kepada arahan-arahan semasa serta enakmen-enakmen perhutnan yang berkuatkuasa.

h) Caj-caj yang dikenakan adalah pada kadar yang berkuatkuasa.

i) Pengarah Perhutanan Negeri berhak mengenakan apa-apa syarat selaras dengan keperluan Enakmen-enakmen dan Kaedah-kaedah yang berkuasa.

j) *Kerajaan Negeri juga berhak menarik balik semua atau sebahagian kawasan bila-bila masa apabila diperlukan.*(Emphasis added.)

Sekian, dimaklumkan.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

t/t

(RAZALI BIN UJANG)

b.p. PENGARAH PERHUTANAN NEGERI,

SELANGOR DARUL EHSAN.

s.k.:

Pegawai Hutan Daerah,

Hulu Selangor

48000 Rawang.

(b) in the response to the letter, the plaintiff by letter dated 16 November 1999 wrote and sent a draft agreement to be executed by the plaintiff and the second defendant. There was no response from the defendants;

(c) in the meantime, the plaintiff was permitted to do some logging activities;

(d) again the plaintiff, by letter dated 5 September 2001 wrote and sent a draft agreement. There was no response from the defendants;

(e) the first defendant by a letter dated 10 May 2003 sent a draft agreement. However, the plaintiff sent a revised draft agreement seeking for comment.

What is essential to note from the facts above is that the plaintiff by a letter dated 7 July 2003 (which was not exhibited in the OS but

referred to by the judicial commissioner), did not accept the draft agreement in toto. The said letter is mentioned by the judicial commissioner as follows:

> 11. After persistent follow ups by the plaintiff, the first defendant finally by a letter dated 10 May 2003 wrote to the plaintiff proposing a standard format of the formal agreement to be executed between the plaintiff and the second defendant. Accordingly, the plaintiff principally adopted the format and by letter dated 7 July 2003 wrote to the first defendant enclosing the revised draft formal agreement ('draft formal agreement') for review and comment by the first defendant.

(f) the first defendant did not respond to the revised draft;

(g) subsequently, the first defendant wrote to the plaintiff to apply for alternative logging area. The plaintiff chose to treat the said letter as termination and commenced the first action which was not successful;

(h) the learned judicial commissioner in the first action considered two termination clauses and come to the conclusion that:

(i) the first termination clause comes from letter of approval dated 30 September 1999 which reads as follows:

> j) Kerajaan Negeri juga berhak menarik balik semua atau sebahagian kawasan — bila-bila masa apabila diperlukan.

(ii) the second termination clause comes from the draft agreement, which reads as follows:

> M. TERMINATION ON NATIONAL INTEREST
>
> (a) Notwithstanding any provision of this Agreement, the Government may terminate this Agreement by giving not less than sixty (60) days notice to that effect to the Company (without any obligation to give reason thereof) if it considers that such termination is necessary for national interest, in the interest of national security or for the purposes of Government policy or public policy.
>
> (b) Upon such termination, the Company shall be entitled to compensation which shall be determined by an independent auditor appointed by the Government after due consultation with the Company.
>
> For the purposes of this Clause, what constitutes 'national interest', 'interest of national security', 'the Government policy' and 'public policy' shall be solely made and determined by the Government and such determination shall for all intent and purposes be final and conclusive and shall not be open to challenge whatsoever.

(iii) concluded that in essence by conduct, the defendants were bound by the terms of the draft agreement. That part of the judgment

reads as follows:

> 28. Accordingly, I find and hold that there is a valid and binding logging contract between the parties in the circumstances. The terms of the logging contract comprise those in the approval letter as well as the draft formal agreement following the Court of Appeal case of *Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd & Anor* [2013] 7 CLJ 713 since the latter was not contested by the defendants in any way. In other words, the defendants had acquiesced to those terms.

(iv) also concluded that there was no repudiation of contract and hence the plaintiff was not entitled to damages without termination of the contract. That part of the judgment reads as follows:

> 40. Thus and notwithstanding that I have found a binding contract between the parties, there was however no repudiation of the contract by the defendant to justify the plaintiffs claim for compensation. Accordingly I hereby order that the plaintiff's claim as pleaded be dismissed with costs. There is also no necessity to proceed further with the next stage of the trial on assessment of damages.

[14] The learned judge in the instant case relied totally on the first judgment of the judicial commissioner and in essence held that upon termination of the contract in breach of cl M stated above, the plaintiff is entitled to judgment. The learned judge's conclusion read as follows:

> 22. Although the letter of approval itself under which the defendants terminated the contract does not specify a circumstance under which the approval can be withdrawn, the final formal draft agreement specifies that the approval of logging can be terminated for purposes of national interest, in the interest of national security or public policy. Taking the contract in entirety it therefore follows that the defendants can terminate the approval but must abide by what is stipulated in the final draft formal agreement.
>
> 23. On termination it is further stipulated in the final draft formal agreement that the plaintiff is entitled to compensation as assessed by an independent auditor. This is what the plaintiff is seeking in this case. In abiding by the terms of the agreement between the parties I had no qualms of allowing the plaintiff's application.
>
> 24. In the upshot the plaintiffs application was allowed with a cost of RM5,000 against the defendants and directed that an independent valuer to assess the compensation due to the plaintiff be appointed within 30 days of the court order.

[15] The memorandum of appeal of the defendants reads as follows:

(i) Yang Arif Hakim yang terpelajar telah tersilap dari segi undang-undang dan fakta apabila memutuskan bahawa Defendan-Defendan perlu mengikut terma-terma di dalam 'Final Draft Formal Agreement' sekiranya penamatan perjanjian dibuat memandangkan surat kelulusan ('Approval Letter') tidak menyatakan dalam keadaan bagaimana penamatan perjanjian perlu dibuat;

(ii) Yang Arif Hakim yang terpelajar telah terkhilaf dari segi undang-undang dan fakta apabila gagal mempertimbangkan bahawa terdapat dua terma penamatan perjanjian diantara Plaintif dan Defendan-Defendan di dalam kes ini dan dua terma penamatan tersebut adalah berbeza di antara satu sama lain;

(iii) Yang Arif Hakim yang terpelajar telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa kedua-dua surat kelulusan dan 'Final Draft Formal Agreement' perlu dibaca secara bersama-sama berkenaan dengan terma penamatan kontrak.

[16] We have read the appeal records and submissions of the parties in detail. After giving much consideration to the submission of the plaintiff, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) in the instant case, there are two documents which are said to be evidence of a contract. The only document where both parties agreed to be binding is the 'approval letter'. The plaintiff's assertion is that the termination must be pursuant to cl M of the draft agreement. The defendants' assertion is that the termination ought to be based on the 'Approval Letter'. *There was no evidence led by the plaintiff in the Originating Summons for this court to ascertain based on which agreement the parties were proceeding with the conduct of the business*. This court is not bound by the grounds of decision of the first judgment, though the decision of the court is relevant (see the Evidence Act 1950). The decision of the court as we had said earlier was that the plaintiff's claim was premature and in consequence was dismissed with costs. In our view, the plaintiff's failure to lead evidence on which agreement the parties were conducting on day to day affairs is fatal to the plaintiff's case;

(b) to say that the 'approval letter' as well as the draft agreement had become one contract is not sustainable in law. It is either the terms of the 'approval letter' or the terms of the draft agreement. Any construction otherwise by the courts will breach the rule as to the requirement of 'certainty of terms' (see *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108); and

(c) in addition, we are not prepared to condone the proposition of the learned judicial commissioner in the first judgment which was followed by the learned judge in the instant case that 'the defendants had acquiesced to those terms' when ss 2 and 3 of the GCA 1949 requirements have not been met.

[17] For reasons stated above, the appeal is allowed with costs of RM15,000 for here and below, subject to allocatur. The order of the High Court is set aside. Deposit is to be refunded.

We hereby order so.

Appeal allowed and order of the High Court set aside.

Reported by Ashok Kumar